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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1198

NOLDE BROTHERS, INCORPORATED,
Petitioner,

v.

LOCAL NO. 358, BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Should an arbitrator decide all claims asserting that the labor agreement required payment of severance pay accrued during the contract term where the parties had agreed to an all-encompassing arbitration provision or must a court decide such claims when the company terminated the employees following contract expiration?

STATEMENT OF THE CASE [1]

1. The Applicable Collective Bargaining Agreement

Petitioner company and Respondent union were parties to a collective bargaining agreement entered into on July 28, 1970. The agreement contained provisions relating to such matters as seniority, holidays, vacations, hours of work and overtime, insurance, authorized absences, and wages. The Article on Wages (Article IX) provided for severance pay upon the closing of the bakery for each employee actively employed for at least three years.

The agreement provided a comprehensive procedure for resolving disputes culminating in binding arbitration in the event that "any grievance" could not be satisfactorily resolved. The arbitration clause further provided that ". . . during arbitration there shall be no strikes, lockouts, boycotts or any stoppages of work." The agreement was to remain in effect until July 21, 1973 ". . . and thereafter, until a new Agreement . . . has been consummated and signed, or this Agreement, after the expiration date, has upon seven days written notice been cancelled or terminated by the Local Union . . . or the Employer." A. 35.

2. The Events Which Gave Rise to This Case

On May 16, 1973, the union advised the company pursuant to Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), of its desire to negotiate certain changes in the terms of the existing contract.

[1] "P. Br." will refer to Petitioner's brief in this Court. In order to conform to Petitioner's method of citation, the decisions of the courts below will be cited as P.A., which refers to pages in the petition for writ of certiorari.

A. 38. After three months of unsuccessful negotiations, on August 20, 1973, the union notified the company in writing of its decision to cancel the current collective bargaining contract, as was its right under Article XIX. A. 41-42. No other action was taken by either party, and the employees represented by the union continued to work thereafter under the terms and conditions of employment specified in the contract. A. 45.[2]

The parties met again on August 31, 1973. At that time, the union negotiators informed the company that the employees had voted to reject a company proposal to extend the contract for another six months, and that the union would strike if necessary to enforce its contract demands. The company then advised that it would close the plant permanently that very night. A. 44-45.

The employees were thereupon notified of the closing by telegram, and operations terminated shortly after midnight of August 31, 1973. At the union's insistence, the employees were subsequently paid wages and certain accrued benefits, including vacation pay, earned and due as of August 27, 1973. They were also paid wages due for work performed between August 27, 1973, and the permanent closing date of August 31,

[2] The union's explanation of the purpose of the seven-day cancellation provision is uncontradicted. Its Business Agent indicated that the provision was included in the agreement at the company's request to enable it to prepare for "any possible strike"—*e.g.*, by disposing of refrigerated merchandise. He also stated that it was the parties' past practice—and their intention in including this particular provision—to "continue the wages, hours and working conditions specified in the expired collective bargaining agreement so long as the employee continues to work during negotiations for a new agreement." (A. 45)

1973. However, the company adamantly refused to pay severance pay to which the union claimed long-term employees had earned under the wage provision of the agreement. The company claimed that the union had "nullified the entire contract", and that termination had extinguished the employees' right to severance pay and precluded arbitration of the union's claim. A. 8.

3. The Union's Claim

The union claimed that the severance pay clause provided accrued or vested rights that permitted employees to earn financial protection during the contract term. Under the union's view of the contract, the affected employees accrued severance pay by working during the contract term and were entitled to receive those earned benefits whenever layoff occurred. Long-term employees, those with three or more years of service, had thus obtained a cushion against the devastating impact of unemployment. The fact that the company might choose to close the plant following the expiration of the collective agreement rather than during its term could not strip these employees of the financial security they had earned.

The parties' clear intention to provide a vested or accrued right here is demonstrated by the fact that the severance pay provision was included in the article entitled "Wages." A. 31. This fact, in itself, strongly suggests that the parties deemed severance pay to be part of the employees' "wages" which, once earned by services performed during the term of the agreement, must be paid even after the agreement expired. The agreement in this case contains no language indicating that severance pay wou'd not be payable in the event

of a shutdown or layoff occurring after the agreement expires. The absence of such a provision is particularly striking in view of the fact that the agreement does contain a provision, Section 6 (A. 31), specifying other circumstances in which severance pay would not be payable. Similarly, the fact that severance pay was to be paid only to employees who had three or more years service also demonstrates that the right was vested or accrued in nature. Since the agreement was for three years, new employees could not possibly meet the conditions of entitlement during the contract term.

4. The Decisions of the Courts Below

In the union's subsequent action under 29 U.S.C. § 185, the District Court addressed the substantive question of whether the employees had a contractual right to severance pay and "reject[ed] the union's major premise that the severance pay issue constitutes an 'earned' or 'vested' right." P.A. 30. Having decided the merits of the contract dispute, the court found it "unnecessary to decide the question whether the plaintiff's right to arbitrate the severance pay issue survived the expiration of the contract—there being no severance pay issue to arbitrate." P.A. 32.

The Fourth Circuit unanimously reversed the refusal to enforce Nolde's agreement to arbitrate. The court concluded that ". . . the district court approached the issues backwards when it first determined whether the company's obligation for severance pay survived the contract." P.A. 4.[3] The

[3] The intention of the parties is critical and not the word used to describe the nature of the union's claim; vested or accrued rights, deferred wages, etc. are merely shorthand as the court below indicated. See P.A. 4-5.

company had agreed to an "all-encompassing" arbitration provision and the Court of Appeals noted that "[t]he company does not deny that the contract by its terms contemplated arbitration of *any* dispute over severance pay." (Emphasis supplied). P.A. 10. The court concluded that " . . . a dispute that turns on whether parties intended certain accruable rights to be enjoyable, even after contract expiration, must be arbitrated if the contract provided for arbitration of such disputes, even if the contingency giving rise to the dispute itself transpired after expiration of the contract." P.A. 9.[4]

SUMMARY OF ARGUMENT

I

An arbitrator should decide all claims asserting that the labor agreement required payment of severance pay accrued during the contract term where the parties have agreed to a broad arbitration clause. A court should refer all claims assertedly governed by the contract to arbitration rather than deciding the merits—the court may not decide such claims, even when the employer had terminated the employees following contract expiration. Since the parties had voluntarily agreed upon an "all-encompassing" arbitration clause and the union had asserted a claim based on the contract, the Court of Appeals correctly held that the

[4] The Court of Appeals was unanimous in concluding that the matter be referred to arbitration and the propriety of referral was the sole question on which certiorari was granted. Judge Widener concurred on referral but dissented on the scope of the arbitrator's authority to consider arbitrability following referral. P.A. 14. This brief will not address the issue that concerned Judge Widener since certiorari has not been granted on that question.

District Court had erred by deciding the merits of the controversy. The union's claim that the severance pay provision conferred an accrued right surviving expiration is clearly one ". . . which on its face is governed by the contract," and the nature of the claim asserted is decisive. *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960).

The decision that this claim was arbitrable was based on the parties' "admittedly broad" agreement to arbitrate, not upon a notion that the obligation to arbitrate is created solely by operation of law. The court properly concluded that the " . . . contract by its terms contemplated arbitration of any dispute over severance pay." P.A. 10. That the union's claim may have been made after the expiration date of the agreement is not controlling since the parties demonstrated no intention to remove the resolution of disputes regarding rights accrued during the term but arising after expiration from the broad provision for arbitration.

This Court's decisions enunciating the presumption of arbitrability confirm the conclusion that an arbitrator and not a court should decide this controversy regarding accrued contract rights. The unanimous decisions in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964) and *Piano and Musical Instrument Workers* v. *W. W. Kimball Co.*, 379 U.S. 357 (1964) are dispositive. Justice Harlan's opinion for a unanimous court in *Wiley* explicitly holds that there is an obligation to arbitrate disputes over claims for rights that were not to be realized until "after the agreement had expired." 376 U.S. at 555. *Wiley* is clearly controlling since the severance pay claims that this Court held arbitrable there are identical to the claims the union seeks to arbitrate here. In *Piano Workers*, this

Court summarily reversed the denial of arbitration for claimed contract violations that arose after the contract expiration date.

It cannot be argued seriously that the expiration or termination of this labor contract totally extinguished the agreement to arbitrate claims based upon that contract. That argument is foreclosed by precedent, *see, e.g., United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and defies common sense. Suits to compel arbitration commenced but not finally decided prior to expiration would be converted into claims requiring judicial inquiry on the expiration date; parties who patiently sought to compromise would lose their right to arbitration because they did not file suit before expiration. There is an incontrovertible contractual obligation to arbitrate in those situations; necessarily there is an obligation to arbitrate claims regarding accrued rights arising after expiration as well. For no provision of the collective agreement differentiates, by its terms, between post-expiration arbitrability of such claims when they arise after expiration rather than before. Before the Fourth Circuit, the company had explicitly conceded the controlling legal principle—that termination did not end the parties' commitment to arbitrate disputes over accrued rights. Petitioner's argument there that the union's present claim was arbitrable "only if the right to severance pay otherwise survived the term of the contract[,]" reveals that Petitioner has confused the merits of the union's severance pay claim with its arbitrability.

II

Reversal would impair the previously unchallenged national labor policy favoring arbitration. It would raise questions as to the present vitality of the long-

standing national policy favoring arbitration and would entangle the judiciary in renewed litigation concerning interpretation of agreements to arbitrate. Requiring courts rather than arbitrators to decide the substantive issues burdens the courts with minute controversies and denies the parties the benefits of dispute resolution by skilled labor arbitrators. Such changes in forum create the danger, realized here, of judicial decisions on the merits contrary to the overwhelming arbitral view. Reversal will increase the possibility of industrial strife by complicating already difficult labor negotiations. Negotiators who have rightly relied upon the availability of arbitrators to fill the interstices of their simply phrased documents would be compelled to obtain far more complex and intricate agreements. The need for voluminous agreements that may prove incomprehensible to laymen would increase the possibility of economic strife. If arbitration is not available in these cases, then strikes over accrued rights may not be enjoined in the federal courts and would be lawful under many agreements. *Buffalo Forge Co.* v. *Steelworkers*, 44 U.S.L.W. 5346 (U.S. July 6, 1976).

III

Petitioner's arguments that the court below violated the policy against compulsory arbitration cannot withstand analysis since the company *voluntarily* agreed to arbitrate " . . . any issue of its obligation for severance pay." P.A. 10 Petitioner inaccurately accuses the court below of "judicially rewriting the parties' arbitration agreeement . . .", P. Br. 18, but in effect urges this court to commit the very error it improperly assigns to the Fourth Circuit. Providing Nolde with a judicial limitation upon its comprehensive agreement

to arbitrate would itself be an improper "rewriting" of the agreement.

No labor policy established in an unfair labor practice context, P. Br. 14, 15, is "completely at odds," *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 261 (1974), with the ruling of the court below. The sole Labor Board case cited by Petitioner, P. Br. 11-13, dealt exclusively with the nature of the *bargaining* obligation under Section 8(a)(5), 29 U.S.C. § 158 (a)(5), and has no bearing on the appropriate interpretation in a § 301 suit of contractual obligations to arbitrate claims concerning accrued rights. And, finally, Petitioner's contention, P. Br. 14-15, that the policy favoring arbitration does not apply since there is no "existing" collective bargaining agreement merely assumes the conclusion on the merits of the union's claim.

ARGUMENT

I. THE PARTIES AGREED TO AN ALL-ENCOMPASSING ARBITRATION CLAUSE AND INTENDED THAT AN ARBITRATOR, RATHER THAN A COURT, RESOLVE ALL CLAIMS FOR ACCRUED RIGHTS GOVERNED BY THE CONTRACT

a. The Court Below Properly Concluded That the Company Had Agreed To Arbitrate Any Dispute Over Severance Pay Provisions of the Labor Contract

An arbitrator should decide all claims asserting that the labor agreement required payment of severance pay accrued during the contract term where the parties have agreed to a broad arbitration clause. A court should refer all claims assertedly governed by the contract to arbitration rather than deciding the merits—the court may not decide such claims, even when the employer

had terminated the employees following contract expiration. The court below properly held that the parties had intended that an arbitrator should resolve "any dispute over severance pay." P.A. 10. Since the company and union had agreed to an "all-encompassing" arbitration clause and the union had asserted a claim "governed by the contract," the Court of Appeals correctly concluded that the District Court had erred by deciding the merits of the controversy. That conclusion is mandated by the admittedly broad agreement of the parties to arbitrate; the "now well-known presumption of arbitrability," *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 377 (1974); and this Court's holdings that all claims to accrued rights "governed by the contract" are arbitrable.

The union's claim that the severance provision conferred an accrued right surviving expiration is clearly ". . . a claim which on its face is governed by the contract," and the nature of the claim asserted is decisive. *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960). The union argued that the severance pay clause provided long-term employees the opportunity to accrue wage rights that could survive the termination of the contract.[5] The union characterized its claim as one for "deferred wages" and argued that the long-term, often elderly, employees involved here were protected against the potential financial catastrophe of a layoff whenever it occurred. In its brief to the court below, Petitioner contended that the

[5] The Union's position on the merits was consistent with the overwhelming view of labor arbitrators that severance pay is an accrued right which survives termination, and was strengthened by the fact that severance pay was characterized as "Wages" in the agreement. A. 31. See cases cited pp. 25-26, *infra*.

severance pay provision here did not survive while agreeing that arbitration would be appropriate despite termination if an accrued right were involved.[6] *American Manufacturing* requires arbitration if the *claim* asserted, whatever its merit, is based on the contract, 363 U.S. at 568, and the court below therefore properly concluded that the severance pay claim was arbitrable.

The Court of Appeals correctly described the arbitration clause here as "all-encompassing," for the clause had no limitations or exclusions whatever. Petitioner has conceded that its agreement to arbitrate is "admittedly broad."[7] Indeed, the arbitration clause here provides even greater scope for arbitration than the "standard form" provision referred to by this Court in *United Steelworkers* v. *American Mfg. Co., supra*[8] and Nolde undertook the obligation to arbitrate with knowledge of the "now well-known presumption of arbitrability." *Gateway Coal Co.* v. *Mine Workers, supra.*

The decision of the court below that this claim was arbitrable was thus based on the parties' comprehen-

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[6] Brief for Appellee Nolde; p. 7. The company contended that a claim for severance pay could be arbitrable "if the right to severance pay otherwise survived the contract." Brief, p. 7. That statement confuses the merits of the union's claim with its arbitrability. See pp. 22-23 *infra.*

[7] Petition for Rehearing before Fourth Circuit, p. 3.

[8] "Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . .

"The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement." 363 U.S. at 565, n. 1.

sive agreement to arbitrate, not upon a notion that the obligation to arbitrate is created solely by operation of law. No non-contractual obligation was imposed upon the company. Severance pay claims were intended by the parties to be processed through the arbitration machinery in the same fashion as all other contract claims and not subjected to time-consuming and costly court adjudication.

Indeed, as the Fourth Circuit noted,

> "The company does not deny that the contract by its terms contemplated arbitration of *any* dispute over severance pay. Thus it is clear that the company literally agreed to arbitrate *any* issue of its obligation for severance pay." (Emphasis supplied) (P.A. 10).

That the union's claim may have been made after the expiration date of the agreement is not controlling, since the parties demonstrated no intention to remove the resolution of disputes regarding accrued rights arising after expiration from the broad provision for arbitration.

b. This Court's Decisions Require Rejection of Petitioner's Contentions

The undeviating decisions of this Court supporting arbitration confirm the propriety of the conclusion that an arbitrator and not a court should decide this contract controversy. In *United Steelworkers* v. *Warrior & Gulf Nav. Co.* 363 U.S. 574 (1960), and consistently thereafter, this Court has emphasized the presumption of arbitrability in the strongest language imaginable:

> "(a)n order to arbitrate the particular grievance shall not be denied unless it may be said with

> positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. 582-583.
>
> "In the absence of any express provision excluding the particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim can prevail . . ." 363 U.S. at 584-85.

Here, of course, there is no ". . . evidence of a purpose to exclude the claim . . ." *Id.*

The unanimous decisions in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), and *Piano and Musical Instrument Workers* v. *W. W. Kimball Co.*, 379 U.S. 357 (1964) are dispositive. In *Wiley* the union sought arbitration of its claim that a successor employer (Wiley) was obligated to abide by the severance pay and other provisions of its predecessor's (Interscience) contract—including those arising after the Interscience agreement expired. Wiley argued that neither it nor Interscience was required to arbitrate claims which "relate to a period beyond the limited term of the agreement." 376 at 554. Justice Harlan rejected the contention that the obligation to arbitrate expired with the contract. Writing for a unanimous Court, he held that Wiley was obligated to arbitrate the union's claim that the employees had contractual rights to severance pay that could be realized after expiration of the agreement:

> "It is true that the Union has framed its issues to claim rights not only 'now'—after the merger but during the term of the agreement—but also after the agreement expired by its terms. Claimed rights during the term of the agreement, at least, are unquestionably within the arbitration

> clause; we do not understand Wiley to urge that the Union's claims to all such rights have become moot by reason of the expiration of the agreement.[8] As to claimed rights 'after January 30, 1962,' it is reasonable to read the claims as based solely on the Union's construction of the Interscience agreement in such a way that, had there been no merger, Interscience would have been required to discharge certain obligations notwithstanding the expiration of the agreement.[9] *We see no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired.*
>
> * * * * * * * *
>
> "Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." (Emphasis supplied.) 376 U.S. at 554-555.

Justice Harlan's opinion for a unanimous Court thus explicitly holds that there is an obligation to arbitrate disputes over claims for rights that were not to be realized until "after the agreement had expired." 376 U.S. at 555.[9] Wiley was required to arbitrate the union's claim for severance pay and other rights that were to be realized "after January 30, 1962," the expiration date of the contract. Like the union in *Wiley*, the union here claimed that the employer is

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[9] Petitioner's contention that *Wiley* is limited to the successorship question, P. Br. 19-20, approaches the disingenuous. Justice Harlan's opinion discussed the arbitrability of accrued rights in a separate section of the opinion demarcated and numbered as such.

"required to discharge (severance pay) obligations notwithstanding the expiration of the agreement." *Id.*

Wiley is clearly controlling since the contractual claims that this Court required to be arbitrated were identical to the contractual claims the union sought to arbitrate here. Nolde's refusal to address that portion of the *Wiley* opinion decisive of the instant case is a startling admission of weakness since both the Court of Appeals and the union quoted and relied upon it.[10]

In *Piano and Musical Instrument Workers* v. *W. W. Kimball Company*, 379 U.S. 357 (1964) this Court summarily reversed the Seventh Circuit's denial of arbitration of claimed contract violations that arose after the contract expiration date. There the union sued to compel arbitration of its claim that employees had seniority rights that entitled them to be hired at a new plant opened by the employer subsequent to the expiration date of the collective bargaining agreement. The Seventh Circuit had denied arbitration on the express finding that the contract dispute "arose *after* October 1, 1961, when the contract in this case expired." (Court's emphasis). *Piano & Musical Inst. Wkrs. U. Local 2549* v. *W. W. Kimball Co.*, 333 F.2d 761, 765 (1964). This Court reversed, citing *United Steelworkers* v. *American Mfg. Co., supra,* and *Wiley.*

Petitioner provides an extended but unpersuasive exegesis of *Piano Workers* devoted to the proposition that the dispute over the right to be hired at the new plant arose prior to the expiration of the contract.[11]

[10] P.A. 5; Respondent's Brief in Opposition to Petition for Certiorari, p. 3; Brief for Appellant to Fourth Circuit, p. 14.

[11] See *Local No. 595 IAM* v. *Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965) and discussion at pp. 29-30.

Since the employer's denial of the union's seniority claim in *Piano Workers* took place *after* the termination of the collective bargaining agreement, the employer's conduct there was analytically no different from Petitioner's refusal here to pay severance benefits following termination. The Seventh Circuit's central finding that no dispute *"arose"* during the contract term, was identical to Petitioner's present contentions.[12] There was no legally cognizable contract violation in *Piano Workers* until the employer commenced operation on October 9, 1961 with employees lacking seniority.

This Court's reversal of the Seventh Circuit's refusal to require arbitration was clearly predicated upon the quintessential logic of *Wiley*—that arbitration is the appropriate mechanism to resolve controversies arising after the expiration of a contract when those controversies concern rights allegedly accrued during the term of the agreement. The Court found it unnecessary to elaborate on the question the Seventh Circuit had deemed critical—when the dispute arose—because that question was simply not of controlling significance in deciding the appropriate forum for resolution of disputes regarding accrued rights.

Wiley and *Piano Workers* refute Nolde's contention that arbitration is appropriate where a party, as in *Wiley,* has sought a declaratory judgment as to the

[12] Petitioner continues its studied ignorance of *Wiley's* accrued rights analysis and suggests that the citation of *Wiley* in *Piano Workers* was intended to deal with procedural arbitrability. That is hardly likely since the Seventh Circuit had denied arbitrability on Nolde's theory here that the claim arose after expiration; the procedural arbitrability issue was mere dictum. If this Court were dealing only with the question of procedural arbitrability, it would not have ordered arbitration of a dispute that arose after expiration and hence was not arbitrable.

post-expiration impact of the agreement a week before expiration but inappropriate when, as in *Piano Workers* and here, an identical contractual determination is sought shortly after the expiration of the agreement. Those opinions cannot be interpreted as necessitating different tribunals for identical contract questions. Arbitrability cannot rest on the union's patience or its capacity to divine the employer's intention before the contract expires.[13] Parties who agree upon arbitration as the mechanism to resolve disputes do not intend such illogical results.

The hostility to forum shopping expressed in *Howard Johnson Co.* v. *Detroit Local Joint Board, Hotel & Restaurant Employees,* 417 U.S. 249 (1974), also rebuts Petitioner's argument that different forums, court and arbitrator, must decide identical questions regarding the right to severance pay. Acceptance of Nolde's argument could permit the rights enjoyed by a party " . . . to depend upon the forum in which it presses its claims." 417 U.S. at 256. Petitioner would require arbitrators to decide contract questions regarding accrued rights where a declaratory judgment action is brought prior to expiration, but a court to decide those same contract issues when suit is commenced after expiration. That result comports with

[13] Under Petitioner's theory of *Wiley,* a union that patiently sought to compromise its disagreements over accrued rights with the employer would lose its right to arbitrate if it failed to bring suit prior to expiration. A union that acted precipitately would preserve its rights. *Wiley* cannot be read as requiring suits that are costly and exacerbating to the parties be instituted before an already inundated judiciary.

neither the parties' intentions nor federal labor policy as clearly established in the decisions of this Court.[14]

c. Termination Does Not Extinguish the Obligation To Arbitrate Claims for Accrued Rights

It cannot be argued seriously that the expiration or termination of this labor contract totally extinguished the agreement to arbitrate claims for accrued rights based upon that contract. There is no contractual support for Petitioner's distinction between the arbitrability of such claims arising before the expiration date and those arising after the expiration date. The labor agreement comprehensively provides for arbitration of "all grievances" without regard to the date they arise. Nor is there any evidence that in negotiating their "admittedly broad" and "all-encompassing" agreement to arbitrate the parties intended to withdraw contract disagreements first arising in the post-expiration period from the normal method of dispute resolution.

If it is to rely upon the agreement's termination clause, Petitioner must argue that termination of the agreement completely eradicates the obligation to arbitrate any claims whatsoever. But that

[14] The analysis of the successor issue in *Howard Johnson* does not disturb the controlling authority of *Wiley* and *Piano Workers* on questions concerning accrued rights. The party against whom arbitration was sought (Howard Johnson) had never signed a contract and there was ". . . no express or implied assumption of the agreement to arbitrate . . . ." 417 U.S. at 264. In contrast, Petitioner here had expressly agreed to arbitrate. Grissom, the seller in *Howard Johnson,* had agreed to arbitrate. And, since only Nolde is involved, an order to arbitrate does not violate any countervailing public policies supporting the free transfer of capital, or a buyer's right not to hire the seller's employees. *Cf.* 417 U.S. at 255, 262.

argument was foreclosed as early as *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and *Piano Workers,*[15] is analytically unsupportable and had been expressly abandoned by Petitioner at an earlier stage of this proceeding.[16] In order to avoid these overwhelming difficulties, Petitioner's brief to this Court is purposefully murky as to the contractual predicate for the distinction they seek to draw.

An agreement's expiration for other purposes does not invariably nullify the right to enjoy contract rights vested or accrued during the contract period. Wages earned during the term of the agreement but unpaid prior to its expiration are payable thereafter. Unused vacation pay is frequently payable following expiration. And, should controversies arise regarding the enjoyment of these alleged vested or accrued rights, those controversies are intended to be settled through the arbitral mechanism contained in the agreement rather than court litigation.

The notion that the parties to this or any other collective agreement intend that resolution of disputes be snatched from arbitration and assigned to a court of law following expiration defies common sense. Examples are plentiful. First, it is frivolous to suggest that the parties intend that expiration be denied

[15] In *Enterprise*, the contract expired on April 4, 1957 and suit was not filed until August 22, 1957, see *Enterprise Wheel & Car Corp.* v. *United Steelworkers*, 269 F.2d 327, 329 (4th Cir. 1959); in *Piano Workers*, the agreement expired on October 1, 1961 and suit was commenced on September 14, 1962, *Piano & Musical Inst. Wkrs. U. Local 2549* v. *W. W. Kimball Co.*, 333 F.2d 761, 762-763 (7th Cir. 1964).

[16] See pp. 22-23 *infra*.

if a suit to compel is commenced but not finally decided prior to expiration; the parties do not wish to provide one who successfully delays litigation the right to switch forums on the merits. Second, arbitration must survive expiration even where a suit to compel is not brought until expiration has passed. *United Steelworkers* v. *Enterprise Wheel Co., supra.* No one wishes to punish a party who patiently seeks to compromise the underlying dispute by denying him arbitration if he withholds litigation until after expiration. Third, Petitioner has conceded that the parties intend arbitration of post-expiration suits where admittedly "vested" rights are involved. See pp. 22-23, *infra.* Fourth, *Wiley* makes clear that the parties intend arbitration of claims regarding accrued rights where suit had been commenced prior to expiration.[17]

There is an incontrovertible obligation to arbitrate under this agreement in the situations outlined above, and necessarily there is an obligation to arbitrate claims regarding accrued rights arising after expiration as well. No provision in our agreement differentiates, by its terms, between post-expiration arbitration of such disputes when they arise after expiration rather than before. The obligation to arbitrate disputes over accrued rights was either terminated for all purposes on the expiration date or not at all. Clearly, it was not terminated since the parties evidenced no

[17] The fact that the union terminated the contract is of no consequence. The employer had a correlative right to do so, A. 35, and its position is not enhanced by the fact that it was the union that acted here. Termination and expiration are identical in legal consequence under 29 USC § 158(d). See Comment, *Duty to Arbitrate Severance Pay Survives Termination of Collective Bargaining Agreement Before Closing of Plant*, 89 Harv. L. Rev. 812, 820, n. 56.

intention to tranfer all unresolved disputes to judicial consideration on that date.[18]

Before the Fourth Circuit, the company had conceded the controlling legal principle—that termination of the agreement did not end the parties' commitment to arbitrate disputes over accrued rights:

> "Obviously, where a right had accrued during the term of a contract, such as a vacation earned under the terms of the contract, but not taken, *the right to enforce such a vested right in arbitration arises under the contract and survives its termination.*"
>
> * * *
>
> "It is, therefore, clear that the claim for severance pay did not arise during the term of the expired contract and could be arbitrable, only *if the right to severance pay otherwise survived the term of the contract.*[19] (Emphasis supplied).

Those arguments reveal that Petitioner has confused the merits of the union's severance pay claim with its

[18] Petitioner's contention, P. Br. 7-8, that the court below improperly limited the parties' broad agreement to arbitrate acknowledges the breadth of its agreement to arbitrate. The court below properly limited its decision to claims for accrued rights, P.A. 12-13, since a court may not compel arbitration of claims that are not "governed by the contract," *e.g.*, cases involving discharges after expiration. Decisions of the courts of appeal denying arbitration of claims not predicated upon the old agreement properly support that critical distinction. See, *e.g.*, *M.K.O. Transit Lines, Inc.* v. *Division No. 892*, 319 F.2d 488 (10th Cir. 1963) relied upon by Petitioner in its certiorari petition, pp. 11-12, but abandoned here, where the court expressly distinguished cases involving the terms of a new contract from those where "the sustained arbitration was with reference to accrued though continuing rights under the terminated agreement . . . ." 319 F.2d at 491.

[19] Brief for Appellee Nolde, p. 6-7.

arbitrability. Unused vacation time, the company admits, is an accrued or vested right that survives the term of the contract and hence disputes as to its payment are arbitrable after termination. Even severance pay, the company admits, would be arbitrable if "the right to severance survived the term of the contract."[20]

But the merits of the union's consistent claim that severance pay was intended to survive termination was an issue for the arbitrator and not a court. The claim asserted was "on its face governed by the contract" and arbitration was therefore the appropriate method for resolution.[21]

II. REVERSAL WOULD SIGNIFICANTLY IMPAIR THE HITHERTO UNCHALLENGED NATIONAL LABOR POLICY FAVORING ARBITRATION AND WOULD EMBROIL THE JUDICIARY IN A MULTIPLICITY OF EMPLOYMENT GRIEVANCES

Acceptance of Petitioner's contentions would raise questions as to the present vitality of the long-standing national policy favoring arbitration and would entangle the judiciary in renewed litigation concerning the interpretation of agreements to arbitrate. Moreover, reversal of the court below would require judges to decide the multifarious and often tedious questions that inevitably develop following expiration of a collective bargaining agreement. These problems typically involve narrow, parochial concerns, minute amounts of money and the interpretation of a single

[20] Brief for Appellee Nolde, p. 7.

[21] The views of the most prominent authority in this field clearly support arbitrability of the union's claim. FELLER, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 792-805 (1973).

collective bargaining agreement. The federal courts would become the tribunals to determine the precise amount of severance pay due a worker who had been on leave of absence for a substantial time, whether and how much unused vacation time is due an individual employee after closing, whether a given individual was in fact offered acceptable alternative employment and forfeited his right to severance pay by refusing it and a host of comparable questions.[22]

A decision foreclosing arbitration in the instant case would promote renewed judicial litigation over arbitrability and weaken the previously "unmistakable" [23] policy favoring labor arbitration. In conformity with the *Steelworkers Trilogy* and this court's undeviating subsequent decisions, the lower courts, both state and federal, have generally accorded arbitration the favored position that Congress and this Court have mandated. But if doubt is cast upon the current authority of those precedents, lower courts that had reluctantly abandoned the traditional common-law hostility to arbitration by reason of those precedents would face new temptations. Unquestionably, the lower courts would be inundated with clever and superficially appealing arguments against arbitration; some of those arguments might well succeed. The present clarity of the law would be muddied and the force of the national policy favoring arbitration diluted.

Requiring courts rather than arbitrators to decide these substantive issues would deny the parties the

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[22] The massive volume of potential litigation in these areas was emphasized by this Court in *Buffalo Forge Co.* v. *Steelworkers, supra* (". . . [i]n 1972" more than 21,000,000 workers in the United States were covered under more than 150,000 collective bargaining agreements). 44 U.S.L.W. at 5350, n. 12.

[23] *Buffalo Forge Co.* v. *Steelworkers, supra,* 44 U.S.L.W. at 5351.

benefits of dispute resolution by arbitrators skilled and knowledgeable in labor relation matters. In the *Steelworkers Trilogy* and in an unbroken line of decisions since then, this Court has emphasized the proposition that the arbitrator should decide these matters since he is familiar with "the industrial common law—the practices of the industry and the shop." *United Steelworkers of America* v. *Warrior & Gulf Navigation, supra,* 363 U.S. at 581-583; *Gateway Coal* v. *Mine Workers, supra,* 414 U.S. at 379. In *Buffalo Forge Co.* v. *Steelworkers* this Court reiterated that "the parties have bargained for" resolution of disputes by the arbitrator and not by a court. 44 U.S.L.W. at 5350. As this Court concluded in *Buffalo Forge,* "[t]he parties have agreed to grieve and arbitrate, not to litigate," *Id.*

The very concerns expressed by this Court in *Buffalo Forge* have been realized in this case—a district court lacking familiarity with the industrial common law reached a decision on the merits contrary to the results reached by those arbitrators who have considered the same question. Arbitrators have consistently held that severance pay is an earned right payable whenever the shutdown or layoff occurs, without regard to whether the agreement has expired. For example, in *Brooklyn Eagle, Inc.,* 32 Lab. Arb. 156 (1959), Arbitrator W. Willard Wirtz held that "[t]he fact that the event of dismissal which made the (severance) payments due came after the termination date does not affect the matter." *Id.* at 160.[24]

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[24] Arbitrator Wirtz based his decision on critical factors peculiar to the realities of collective bargaining and noted the disruptive effect of a contrary ruling:

> "It would be more to the point, if it were appropriate to seek out the parties' intent beyond its expression in the words of

The same result was reached in *H. K. Porter Co.*, 49 Lab. Arb. 147 (1967) where the arbitrator concluded that the employees were entitled to severance pay despite the fact that the closing of the plant did not occur until several days after the agreements expired. Note, *Termination of Collective Bargaining Agreements—Survival of Earned Rights,* 54 Northwestern L. Rev. 646, 647 (1959) ("[i]t is almost uniformly held when a severance pay clause is in question that

Section 10 itself to recognize how sharply and with what certainty they would have rejected some of the necessary implications of the interpretation urged here by the Publisher. This position would mean that under such a clause the employer could, in his discretion, control and even defeat the realization of the earned and agreed upon severance benefits by waiting to make dismissals until a contract expired. It would mean, as a practical matter, that this is exactly what would be done in any case where an employer might decide to go out of business.

"Such an interpretation would mean, too, that in any negotiation regarding the renewal of a collective bargaining agreement containing a severance payment provision one of the pressures on the union would be that unless agreement on new contract terms was reached part of the price would be the complete loss of the value of the severance payment rights of all employees based on their years of work already performed. These rights are plainly subject to modification, even elimination, in any new collective bargaining negotiation. But this would be by the action of the representatives of the employees who own them. The idea that having earned them, and owned them, the employees' bargaining position in a new contract negotiation would start again from nothing is not important here from the standpoint of its being inequitable. What is relevant is that this is clearly not the way these obligations and rights would be viewed by the parties. They would view them as obligations and rights covering services already performed, as established by bi-lateral agreement. It would violate such a view completely to suggest that the rights already earned would be wholly destructible at the end of any contract period by a unilateral determination of the employer that he was no longer willing or inclined to make payment on them." *Id.* at 161.

the employer's obligation under that clause continues after the contract terminates.")

Disruption of the previously uniform decisions of this Court enforcing the national labor policy favoring labor arbitration would unduly complicate labor negotiations and increase the possibility of industrial strife. Negotiators have rightly anticipated that arbitration will be available to resolve contractual disputes. The mutual expectation that a skilled labor arbitrator will deal with the controversies that invariably arise have facilitated negotiations. There has been no need for the voluminous and intricate compacts typical of a multi-million dollar financing or real estate transaction because non-lawyer labor negotiators have safely assumed that arbitrators trained in the "law of the shop" will fill in the interstices of their customarily brief and simply phrased documents. Simplicity in drafting is a major consideration for labor agreements which must be applied by workers in the shop and their foremen.[25]

Reversal of the decision of the Court of Appeals would diminish the certainty that an arbitrator will be available to bring "his knowledge of the common law of the shop" and "considerations which are not expressed in the contract as criteria for judgment." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582. Intent upon assuring that they not lose the benefits of their bargaining in protracted and costly litigation before relatively untutored courts, negotiators will seek to protect themselves against disappointments by insisting upon far

[25] *United Steelworkers v. Warrior & Gulf Co., supra,* 363 U.S. at 580.

more complex and intricate contractual provisions. Such necessarily altered bargaining tactics would complicate the already difficult task of consummating labor agreements and increase the possibility of economic strife. Since lengthy lawyers' documents are frequently incomprehensible to laymen, both negotiators and ratifying workers will be reluctant to approve agreements they cannot understand.

Adopting Petitioner's position would increase the risk of strikes and lockouts over contract disputes that arise months after expiration and even those that arise after the successful negotiation of a new agreement. For example, an argument concerning pension rights under an expired agreement would no longer be arbitrable under that agreement; it would not be arbitrable under the new agreement either if the Court accepts Petitioner's argument that arbitration is not appropriate if based in any part on events occurring outside the contract term. Since such a strike would not be one over an arbitrable grievance, it could not be enjoined in a federal court under *Buffalo Forge*. Indeed, since many contracts like the contract here prohibit only strikes "pending negotiation or during arbitration," A. 33, strikes over disputes under the old agreement would be lawful in all respects. *Cf. Buffalo Forge Co.* v. *Steelworkers, supra.* 44 U.S. L.W. at 5350, n. 10.

III. NO COUNTERVAILING FEDERAL POLICY REQUIRES REVERSAL SINCE PETITIONER FREELY UNDERTOOK AN "ADMITTEDLY BROAD" AGREEMENT TO ARBITRATE

Petitioner's arguments that the court below violated the policy against compulsory arbitration cannot withstand analysis since the company voluntarily agreed to arbitrate ". . . any issue of its obligation for severance pay." P.A. 10. The court noted that "[t]he company does not deny that the contract by its terms contemplated arbitration of any dispute over severance pay." *Id.* Nolde bargained for an "admittedly broad" obligation to arbitrate with full knowledge of the "now well-known presumption of arbitrability." *Gateway Coal Co.* v. *Mine Workers, supra.* No outside agency compelled Nolde to undertake that obligation. Having voluntarily done so, it may not now renounce its bargain as compulsory arbitration.

Petitioner inaccurately accuses the court below of "judicially rewriting the parties' arbitration agreement . . . ", P. Br. 18, but in effect urges this court to commit the very error it improperly assigns to the Fourth Circuit. There was no manner in which the court below could rewrite Nolde's agreement to arbitrate to provide greater breadth than the clause the parties themselves had drafted. Providing Nolde with a judicial limitation to its comprehensive agreement to arbitrate would itself be an improper "rewriting" of the agreement. The court below properly refused to carve an exception into the parties' comprehensive agreement to arbitrate.

The decision of the court below is in accord with the better reasoned decisions of other lower courts rejecting contentions similar or identical to those advanced by Petitioner. See, most particularly *Local No. 595 IAM* v. *Howe Sound Co.*, 350 F.2d 508, 511 (3d Cir. 1965), relied upon by the court below. *Cf. United States Gypsum Co.* v. *United Steelworkers of America,* 384 F.2d 38, 44 (5th Cir. 1967). In *Howe Sound,* the court ordered arbitration of the union's claims for vacation pay based on a provision "that an employee who *leaves* the company for any reason should receive pro rata vacation pay within 30 days after his termi-

nation" and for a holiday that was observed thirty days after the closing of the plant and the expiration of the agreement. 350 F.2d at 510. Both claims "arose" after expiration under any conceivable theory but the Court held that fact not controlling:

> Since the Union's claim is founded on the expired agreement it is also bound by the arbitration provision of the agreement, even though the issue may not have been raised until after the expiration of the agreement. 350 F.2d at 511.

The precise issue involved here was decided in favor of arbitrability in *In Re Potoker,* 2 N.Y.2d 553, 141 N.E.2d 841 (N.Y. Ct. App. 1957), *cert. denied* 355 U.S. 883, and *United Steelworkers* v. *H. K. Porter,* 64 LRRM 2202 (W.D. Pa. 1966). A law review comment on the instant case concludes that ". . . arbitration should be preferred to judicial resolution, even after expiration and plant shutdown." Comment, *Duty to Arbitrate Severance Pay Survives Termination of Collective Bargaining Agreement Before Closing of Plant,* 89 Harv. L. Rev., 812, 821 (1976). See also *Monroe Sander Corporation* v. *Livingston,* 377 F.2d 6, 10-11 (2d Cir. 1967).[26]

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[26] *Monroe Sander* specifically addresses the issues involved here; other decisions of the Second Circuit cited by Petitioner do not. See 377 F.2d at pp. 10-11. *Procter & Gamble Ind. U.* v. *Procter & Gamble Mfg. Co.,* 312 F.2d 181 (2d Cir. 1962), cited by Petitioner, is expressly distinguished by *Monroe Sander* and in *Bressette* v. *International Talc Co., Inc.,* 527 F.2d 211, 216 (2d Cir. 1975). *Local 1251, UAW* v. *Robertshaw Controls Co.,* 405 F.2d 29 (2d Cir. 1968) does not deal with arbitrability. *Flight Engineers Int'l Assoc., EAL Chapter* v. *Eastern Air Lines,* 359 F.2d 303 (2d Cir. 1966) expressly notes that an arbitration board ". . . was still the appropriate forum for the assertion of rights which had arisen while the collective bargaining agreement was still in effect. . . . But no such rights are asserted here." 359 F.2d at 310.

These authorities are far better reasoned than the decisions cited by Petitioner, P. Br. 16-17. The decisions of the Sixth Circuit in *I.A.M. Local Lodge 2369* v. *Oxco Brush Division,* 517 F.2d 239 (6th Cir. 1975), and *Local 58, United Rubber, Cork, Linoleum and Plastic Workers, AFL-CIO* v. *Sun Products Corp.,* 521 F.2d 1286 (6th Cir. 1975), are best explained by the fact that the Sixth Circuit found in the union's favor on the merits in reliance on its own strong precedents dealing with the substantive issue of vacation pay. Both decisions accepted the union's argument that vacation pay is actually additional wages for work already performed, 517 F.2d at 243, 521 F.2d at 1288,[27] the very substantive argument advanced regarding severance pay in this case. See pp. 4-5, *supra.* The Sixth Circuit's analysis of arbitrability is unpersuasive and the court does not discuss the strong contrary authority of *Howe Sound* and the decisions noted above. Other cases cited by Petitioner are inapplicable[28] and unpersuasive.[29]

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[27] In *Oxco,* the parties had contractually withdrawn from the arbitrator the authority to award "compensation, damages, or other redress to any employee or the Union." 517 F.2d at 242. Since the employees in *Oxco Brush* sought "compensation" (vacation pay), the arbitrator would have been powerless to resolve the dispute.

[28] The Fourth Circuit correctly distinguished the affirmance without comment in *Milk Drivers Local 246* v. *Thompson Honor Dairy,* 489 F.2d 1272 (D.C. Cir. 1974) as involving negotiation of a benefit not an accrued right. P.A. 13, n. 7. The unreported portion of the District of Columbia Court's memorandum made clear that no contract claim was made, since the company's only obligation was to negotiate. See Brief of Appellant Union to Fourth Circuit, p. 17, n.4.

[29] *OCAW International Union* v. *American Maize Products,* 492 F.2d 409 (7th Cir. 1974), cert. denied, 417 U.S. 969 (1974), involved a lockout following termination and not a claim for accrued rights allegedly surviving that action.

No labor policy established in an unfair labor practice context, P. Br. 14, 15, is "completely at odds," *Howard Johnson Co.* v. *Detroit Joint Board, supra,* 417 U.S. at 261, with the ruling of the court below. No unfair labor practice doctrine demands that a party's agreement to arbitrate be ignored, circumscribed or even narrowly construed in a § 301 suit. The Labor Board has had neither the occasion nor the inclination to interpret agreements to arbitrate. The Board has gone so far as to defer its own processes in order to afford the fullest scope to the federal policy favoring arbitration in a major and highly controversial series of decisions. See, *e.g. Collyer Insulated Wire,* 192 NLRB 837 (1971).

The sole Labor Board case cited by Petitioner, P. Br. 11-13, dealt exclusively with the nature of the statutory duty to bargain under Section 8(a)(5), 29 U.S.C. § 158(a)(5) and has no bearing on the appropriate interpretation of contractual obligations to arbitrate claims concerning accrued rights in a § 301 suit. *Hilton Davis Chemical Co.,* 185 NLRB 241 (1970). There the union conceded *ab initio* that the previous contractual obligation to arbitrate had expired and that the employer was contractually free not to arbitrate. The union argued, however, that the statutory duty to bargain under Section 8(a)(5) made it an unfair labor practice for the employer not to agree to arbitrate in the future, even in the absence of a contract. The Board rejected that union's argument on the ground that imposing such a statutory duty in effect would be requiring the employer to enter into a new contract. Since Section 8(d), 29 US.C. 158(d) makes clear that there is no duty to make a concession, the Board concluded that the duty to bargain in good faith did not

permit it to impose a "statutory obligation to reach agreement" to arbitrate. 185 NLRB at 242.

The Fourth Circuit's conclusion is thus not "completely at odds" with Board law since *Hilton* does not bear upon the union's contention here that there was a freely entered contractual obligation to arbitrate. In contrast to the union in *Hilton,* the union here *does* contend that the employer's earlier contractual obligation to arbitrate covers the disputes in question. Respondent does not argue that Nolde has a nonconsensual duty to arbitrate imposed as a matter of public law under Section 8(a)(5), but rather that Nolde was a consenting party to a binding contract.

Petitioner's contention, P. Br. 14-15, that the policy favoring arbitration does not apply since there is no "existing" collective bargaining agreement assumes the conclusion to be reached. It is premised on the assumption that no substantive rights survive termination of the contract, the very issue to be decided in whichever forum, court or arbitral, is to resolve the parties' controversy. As we have seen, the proposition that *no* contract rights survive the expiration of a collective agreement flies in the face of both reason and precedent. Where, as here, a claim is asserted that is "governed by the contract," that contract is an "existing" agreement and the Congressional policy favoring arbitration applies.[30]

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[30] The legislative history to which Petitioner refers (P. Br. 15) deals with the emergency strike provisions of Taft-Hartley, not the contract arbitration provision of § 203(d). The expressed Congressional reluctance to require the bargainers to accept substantive contract provisions has no applicability to a situation in which a party has agreed to contract arbitration.

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed. If the Court should conclude that the matter is not arbitrable, the case should be remanded to the Court of Appeals for a determination of the merits of the union's claim for severance pay.[31]

Respectfully submitted,

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[31] The Respondent union appealed from the District Court's decision on the merits; the Court of Appeals did not reach that question in view of its decision on arbitrability.